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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 720

GULF BOTTLERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–34) is not yet reported. The Board's decision and order (R. 216a–288a)[1] are reported at 127 NLRB 850.

JURISDICTION

The opinion and judgment of the court of appeals were entered on November 9, 1961 (Pet. 19, 35–36). Petitioner's motion for rehearing was denied on November 30, 1961 (Pet. 36), and the decree enforcing the Board's order was entered on December 5, 1961 (Pet. 37–38). The petition for a writ of certiorari

[1] "R." refers to the Joint Appendix filed with the court below.

was filed on February 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that the Company's driver-salesmen were "employees" rather than "supervisors," and thus entitled to the protection of the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 45–46 of the petition.

STATEMENT

The Board found that the Company committed various unfair labor practices in an effort to thwart the efforts of its driver-salesmen to select the Union as their collective bargaining representative. Thus, the Board found that the Company, following the Union's demand for recognition on behalf of the driver-salesmen, violated Section 8(a) (2) and (1) of the National Labor Relations Act by sponsoring the formation of an employee labor organization[4] within the Company's plant (R. 216a–217a, 282a). The Board also found that the Company discharged driver-salesmen Dudley Walker and Anthony Fazzio because of their activity on behalf of the Union (R. 216a–217a, 282a). These substantive findings are not at issue. The only question is whether the Board properly de-

[2] Gulf Bottlers, Inc.

[3] International Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers of America, AFL–CIO.

[4] The Gulf Bottlers' Employees Association.

termined that the driver-salesmen were employees rather than supervisors, and thus entitled to the Act's protection (Pet. 2). The underlying facts on this issue are as follows:

The Company distributes Pepsi-Cola and other bottled drinks in the New Orleans area (R. 224a–225a). For this purpose, the Company employs a sales manager, 5 route supervisors, 35 driver-salesmen, and some helpers (R. 234a; 5a, 15a–16a, 114a–116a). Each route supervisor oversees the work of several driver-salesmen (R. 234; 3a–4a, 16a, 137a–139a). The driver-salesman makes deliveries to customers on assigned routes and picks up empty bottles (R. 234a; 16a, 115a–116a, 126a). He makes collections, assists customers in displaying the merchandise, solicits new business, and receives complaints which he may handle or turn over to his route supervisor. The driver-salesman at his option may use a helper whose principal function is to unload and deliver full cases and to pick up and load empties on the truck (R. 234a; 5a, 15a–16a, 114a–116a, 126a, 139a). However, before the advent of the Union, the driver-salesman was not permitted to use a helper if he did not sell at least 800 cases a week (R. 233a–234a; 6a–7a).

The driver-salesman generally picks up a helper from a pool of men who gather each morning before the Company's premises for a day's work, but he may obtain one from other sources. He may use a helper regularly, occasionally, or not at all, and may let him go for any reason. The Company deducts $15 per week from the driver-salesman's weekly commission

to pay part of the helper's wages (R. 234a–235a; 33a, 40a, 51a–52a, 108a–111a, 116a).

The route supervisors enforce Company policy as to the conduct of the routes (R. 5a, 15a–16a, 135a). They occasionally ride the trucks to observe the work performance of the driver and helper (R. 138a–139a). They may discipline drivers directly or through the sales manager (R. 16a). If dissatisfied with the work of the driver's helper, they take disciplinary action through the driver (R. 235a; 132a–133a, 138a–139a, 141a–142a).

Upon these facts, the Board concluded that, notwithstanding their power to hire and fire helpers, the driver-salesmen are essentially rank-and-file employees and not supervisors within the meaning of Section 2(11) of the Act. Accordingly, they are entitled to the Act's protection. (R. 216a–217a, 224a–225a, 239a.) The court of appeals (Chief Judge Miller dissenting) accepted the Board's findings and conclusions, and enforced its order in full (Pet. 19–34, 37–38).

ARGUMENT

1. The sole issue raised by this petition is whether the Board properly concluded that the Company's driver-salesmen are employees, rather than supervisors, within the meaning of Section 2(11) of the Act. The question whether an individual is a supervisor turns largely on the facts of each case, entailing an evaluation of a particular individual's job content and authority in a particular industrial environment. Even more restricted is the determination of whether driver-salesmen of the type in-

volved here are or are not supervisors. Since its inception, the Board has been called upon to evaluate the status of driver-salesmen in only a handful of cases, and the instant case is the first one involving this problem to reach a court of appeals. Such a limited factual question does not warrant review by this Court. In any event, as we show below, the court below was clearly correct in sustaining the Board's conclusion that the driver-salesmen here are not supervisors, for that conclusion "has 'warrant in the record' and a reasonable basis in the law." *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131.

2. Section 2(3) of the Act excludes from the definition of the term "employee," and therefore from the protection of the Act, "any individual employed as a supervisor." Section 2(11) of the Act defines the term "supervisor" as:

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

By this exclusion, which was enacted in 1947, Congress sought to overrule *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, which held that, under the Wagner Act, the employer was required to bargain with unions representing units

composed of foremen. Congress feared that, if persons relied on by management to represent its interests in dealing with rank-and-file employees were permitted to join and bargain through the same unions which represented the latter, there was a danger of divided loyalty; hence, Congress relieved employers of the obligation to accord to "the front line of management the anomalous status of employees."[5]

However, at the same time, Congress made if clear that it did not intend to enlarge the category of supervisors beyond that established by the Board under the Wagner Act.[6] The Board had treated as "supervisors" only employees regularly vested with "genuine management prerogatives" in relation to subordinate employees. Thus, the Board had regularly included straw

[5] Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 5, Leg. Hist. of the Labor-Management Relations Act, 1947, p. 411 (G.P.O., 1948), (hereinafter Leg. Hist.). See also, H. Rep. No. 245, 80th Cong., 1st Sess., pp. 13–17, Leg. Hist. 304–308.

[6] In explaining the meaning of Section 2(11), the Senate Committee stated that it "has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank-and-file." S. Rep. No. 105, 80th Cong., 1st Sess., p. 4; Leg. Hist. 410. Senator Taft restated this proposition on the floor of the Senate, declaring that the "definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years." 93 Cong. Rec. 4678; Leg. Hist. 1304. And see Senator Ellender's similar statement, 93 Cong. Rec. 4138; Leg. Hist. 1068. Section 2(11), as finally passed, was drafted completely in the Senate and was accepted by the conferees without change. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 35; Leg. Hist. 539.

bosses, headmen, set-up men, and other minor supervisory employees in rank-and-file bargaining units." Similarly, it had consistently held that a craftsman or other skilled employee who had a helper was not a supervisory employee—and hence excludable from a rank-and-file unit—merely because he could effectively recommend changes in the employment status of his helper."

To treat these driver-salesmen as supervisory employees would extend Section 2(11) beyond Congress's intention. The record shows that the 35 driver-salesmen, who are under the supervision of route managers, constitute the Company's basic work force for the sale and distribution of its products. There would be little doubt that they were nothing more than rank-and-file employees but for the fact that they hired helpers to aid them in the performance of their duties. However, the Company did not require,

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"See *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 NLRB 284; *Endicott Johnson Corp.*, 67 NLRB 1342; *Pittsburgh Equitable Meter Company*, 61 NLRB 880; *Richards Chemical Works*, 65 NLRB 14 (specifically cited in S. Rep. No. 105, note 6, *supra*, at p. 4, Leg. Hist. 410).

"See *Dural Texas Sulphur Co.*, 53 NLRB 1387, 1389-1391; *Southern Bleachery & Print Works, Inc.*, 50 NLRB 336; *Atlantic Creosoting Co.*, 72 NLRB 1154, 1157; *Republic Flow Meters Co.*, 72 NLRB 296, 299; *William C. Meredith Co., Inc.*, 74 NLRB 1064. Indeed, in *Distributors Association of the Norfolk Area*, 73 NLRB 656, decided shortly before the 1947 amendments, the Board included driver-salesmen like those here in a unit with warehousemen although the driver-salesmen could "determine the need for any helpers, hire them, discharge them and fix the terms and conditions of their employment" (at 660).

and indeed sought to discourage, the use of helpers, and the driver-salesmen's selection and direction of a helper were routine acts which did not involve "the use of independent judgment" in any meaningful sense.[10] In these circumstances, even though the driver-salesmen could hire and fire the helpers, this hardly suffices to cloak the former with some of the Company's managerial prerogatives in their relations with the helpers. The driver-salesmen thus are not supervisors, as Congress conceived of that term. See *National Labor Relations Board* v. *Southern Bleachery & Print Works*, 257 F. 2d 235, 237–239 (C.A. 4), certiorari denied, 359 U.S. 911; *National Labor Relations Board* v. *Quincy Steel Casting Co.*, 200 F. 2d 293, 295–296 (C.A. 1). Their relation to the helpers is essentially no different from that of a skilled craftsman to a helper he uses in the performance of his work; the Board has long held that the craftsman does not become a supervisor merely because he can effectively control the selection of his helper.[11]

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[9] Prior to the advent of the Union, a helper could be hired only if the driver-salesman sold at least 800 cases a week. Moreover, if a helper was used, the Company deducted part of his wages from the driver-salesman's weekly commission (pp. 3–4, *supra*).

[10] The driver-salesmen's direction of the helpers consisted largely of simple orders to carry a certain quantity of merchandise to the customers' premises and to pick up cases of empty bottles (R. 235a; 34a, 110a–111a, 115a).

[11] As the Board stated in *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791: "We have no doubt that almost any employer, when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recom-

3. Petitioner contends, however, that the existence of any one of the indicia of supervisory status listed in Section 2(11) is sufficient to satisfy the literal requirements of that provision, and that is done here by showing that the driver-salesmen possess the power to hire and fire (Pet. 7-8). However, a statute must be interpreted so as not to achieve a result "plainly at variance with the policy of the legislation as a whole." *United States* v. *American Trucking Associations*, 310 U.S. 534, 544. As we have shown, petitioner's reading of Section 2(11) would extend the supervisory exemption well beyond the limited area which Congress intended to encompass.

Nor is the holding of the court below in conflict with that of other courts (Pet. 7, 13, 17). The different results in the cases cited by petitioner are attributable to differences in the facts of those cases. Thus, *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385 (C.A. 6), certiorari denied, 338 U.S. 899, involved the status of a control operator, who was in charge of a steam electric generating plant, directing the activities of two other skilled operators. And *National Labor Relations Board* v. *Leland-Gifford Company*, 200 F. 2d 620 (C.A. 1), involved the status of former department heads, who, as a result of a reduction in force, were also assigned some production work. Clearly, the holdings in those cases that the persons involved were supervisors is not dispositive of the status of the

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mendation, it is inherent in the craftsman-helper relationship, as Congress obviously knew." See also cases cited in note 8, *supra*.

driver-salesmen here, whose responsibilities were far smaller and who were delegated none of the managerial prerogatives possessed by the former.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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